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IN THE
Supreme Court of the United States

October Term, 1985

PAUL R. RIDDICK, JR., et al.,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF THE CASE

The District Court and the Court of Appeals determined that the Norfolk Public School System is unitary and had been so for a number of years. The District Court found as a matter of fact that there was no intent to discriminate

in the School Board's adoption of a Neighborhood Elementary Schools Plan, and the Court of Appeals affirmed this finding. Both courts below found the plan constitutional.

Petitioners brought this action in the United States District Court for the Eastern District of Virginia in 1983 contending that the School Board's Proposal for a Voluntary Stably Desegregated School System denied them equal protection of laws. This proposal, sometimes called the Neighborhood Elementary Schools Plan, was referred to in the District Court as the Proposed Plan. Petitioners sought an injunction against implementation of the Proposed Plan and a declaration that the Proposed Plan is unconstitutional. They also moved the

District Court to set aside the Order entered February 14, 1975, by which the Norfolk Public School System was declared unitary after 19 years of desegregation litigation (the Beckett case).

After fifteen days of trial and full briefing of the issues, the District Court found the Proposed Plan constitutional, denied petitioners' prayer for injunctive relief, and denied their motion to set aside the February 14, 1975 Order, all by opinion and order dated July 9, 1984. The District Court's ruling was affirmed in all respects, without dissent, by a panel of the Court of Appeals for the Fourth Circuit on February 6, 1986. A petition for rehearing en banc and motion to supplement the record[1/] were denied on

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1/ Respondents have opposed petitioners' motions to supplement the

Footnote Continued on Next Page

March 19, 1986.

Three of the seven School Board members herein are black. The schools are administered by a black superintendent. Two of three regional assistant superintendents were black at the time of trial. Between 40 and 50 percent of principals and teachers are black.

The District Court found that the Norfolk School System is unitary and that it had, pursuant to earlier order, been unitary since at least February 14, 1975. The Court found that the School Board's stated reasons for adopting the Proposed Plan were legitimate and were

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Footnote Cont'd.

> record with more recent enrollment figures not because the figures are inaccurate but because the figures by themselves do not prove anything.

not pretexts for discrimination and that the petitioners had failed to prove that the School Board acted with discriminatory intent.

The petitioners' description of the Beckett/Brewer case between 1956 and 1975 is substantially accurate. However, petitioners' suggestion that the February 14, 1975 Order by which the system was declared unitary was a mere consent Order was rejected as a matter of fact by the District Court, which said

> This Court finds that its Order of February 14, 1975 was carefully considered for every phrase it contained. The Order manifested this Court's determination that, as a factual matter, the Norfolk system was free of discrimination and was unitary in 1975.

627 F.Supp. at 819-20, Appendix at 115A-16A. The District Judge below, the

Honorable John A. MacKenzie, was the same judge who, in the Beckett case, entered the order of February 14, 1975, and to whose docket the Beckett case had been assigned since July 7, 1971. 627 F.Supp. at 816, Appendix at 101A.

Petitioners suggest that Dr. Armor's predictions that the Proposed Plan would increase white enrollment rested solely on a finding in a public opinion poll that white parents were not opposed to schools that were fifty percent or more white. This suggestion ignores the multiple factors in Armor's report by narrowing attention to a single question out of the more than one hundred questions asked and does so completely out of context. The primary focus of the opinion survey, which was but one part of underlying data and

analysis used in Dr. Armor's projections, was mandatory busing. The survey was a detailed and professional public opinion poll, composed of over one hundred questions, of which only one is related in the petitioners' brief. The predictions in the Armor report (Ex. 43, R. 755) are clearly based not upon the response to a single question but upon a multitude of considerations including these: an analysis of past and present enrollment; a review of historic and present demographics; an analysis of individual school enrollment and demographics; an analysis of enrollment in the only other system which initiated and then stopped mandatory busing; enrollment projections based upon the cohort retention method, a statistical sociological method for projecting

enrollment; consideration of where those students who left the system and who elected not to enter the system may have gone; and community reaction to the system and to the quality of education in the system and to proposed changes in mandatory busing.

Petitioners' description of the Proposed Plan omits consideration of the Majority-Minority transfer program and the impact of that program on the enrollment figures in the elementary schools. That realistic and workable program allows any student enrolled in a school over 70% of his or her race, at the parents' option, to transfer to a school in which his or her race is in the minority. After taking into consideration the expected number of Majority-Minority transfers, the School

Administration projected that in the Fall of 1984 the enrollment at Bay View Elementary School would be 25% black, rather than 15.1% black as indicated at page 19 of the Petition. Bay View was projected to have the proportionally largest white enrollment. No other school was projected to have enrollment over 70% white after the Majority-Minority transfers were accommodated. Of the 14 majority white schools condemned by petitioners, only five were projected to have enrollments over 60% white.2/

2/ For reasons unexplained, petitioners rely on the proposed enrollment figures for Fall of 1983. By the time this case was tried, in February 1984, projections for Fall 1984 were available and were introduced in evidence before the District Court. Ex. 1D, R. 707-08.

Petitioners' discussion of the Plan also omits reference to several important aspects of the Plan which do not relate directly to busing. First, the Plan includes a multicultural program "designed to provide contacts between students of different races, thus offsetting any possible racial isolation of students in a predominately one race school." Ex. 1, R. 301. See also Ex. 4. The Plan includes a parental involvement program designed to increase the participation of parents in the educational system. Parental participation in the system was found below to have been substantially harmed by the busing plans. For example, the Parent Teachers Association (PTA) had been "virtually destroyed" by crosstown busing. 627 F.Supp. at 824.

The Plan also includes the filing of an annual accounting with the United States Magistrate for the United States District Court for the Eastern District of Virginia to report upon the allocation of resources within the School System and to provide an opportunity for those who are dissatisfied to present their complaints to the Magistrate. This step was taken in order to assuage the fears of those who might believe that, despite the major participation by blacks in the administration of the School System, predominately black schools could be short-changed in resources. The District Court and the Court of Appeals looked with favor on this feature of the Plan.

Finally, the School Board resolved in 1983 that the Plan would not be

implemented without the approval of the United States District Court for the Eastern District of Virginia. The City Attorney was directed to takes steps to bring the Proposed Plan before the Court, and such steps were initiated. The legal proceedings instituted on behalf of the School Board were withdrawn after the filing of petitioners' Complaint in this case.

SUMMARY OF ARGUMENT

The decisions below do not permit "immediate resegregation" of Southern schools as contended by petitioners. The School Board of the City of Norfolk acted not "immediately" but only after the Norfolk system had been unitary for years, enough time for nearly two generations of students to pass through the elementary schools. The Proposed Plan

does not "resegregate" anything. It eliminates crosstown busing for elementary school students, but it retains voluntarily many other desegregation remedies, including crosstown busing of middle school and high school students, multicultural programs, and drawing of elementary attendance zones in a way to maximize integration. In the face of this and of the District Court's findings of fact that the Board acted for good reasons and without discriminatory intent, petitioners cannot seriously contend that school boards everywhere can, in reliance on the decisions below, immediately on achieving unitary status "resegregate" the schools.

The focus of this Court's attention in school cases has been the dual school system, how it manifested itself and how

it was to be eradicated. In Norfolk the dual system was eradicated, and the system became unitary. The District Court so found in 1975 and reiterated that finding in 1984. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), is this Court's leading decision on the use of crosstown busing as a desegregation remedy. This Court made clear in Swann that busing was a remedy to be used in the interim transitional period while the dual system was being converted to a unitary system. The principle that busing, pairing and zoning are temporary remedies permeates the Swann opinion, and Swann clearly foretold that the day would come when the remedies would be laid aside because they had worked their cure. So it was in Norfolk, and the

decisions below are consistent with Swann and the other decisions of this Court.

The courts below properly found no discriminatory intent on the part of the School Board. Petitioners say that the impact--ten predominately black schools--taken together with the Board's consideration of white flight, demonstrates a constitutional violation.

This Court has always said that neighborhood schools, even where they involve de facto segregation, are constitutional absent intentional discrimination. The consideration of white flight and its potential, in fact, to resegregate the system is not discriminatory. The District Court found, under the facts in this case, that the School Board considered white flight in the

proper context as part of its effort to maintain integration in the system. Petitioners wish to promote integration, but they fail to demonstrate how integration can be pursued without considering the racial proportions of the system and without implementing measures designed to preserve systemwide racial balance.

Because the Norfolk system is unitary, the decisions below are consistent with Swann. The District Court applied the proper standards in evaluating the proofs and found as a fact no discriminatory intent in the Board's actions. Thus, the courts below properly held the Proposed Plan constitutional.

ARGUMENT

I. THIS CASE, DECIDED ON FACTS EXPRESSLY APPLICABLE TO THE NORFOLK SCHOOL SYSTEM, DOES NOT HAVE THE SWEEPING NATIONAL IMPACT PETITIONERS WOULD GIVE IT.

Petitioners say that the holdings of the courts below will have a sweeping impact since in every past, present and future school desegregation case the system will eventually become unitary as defined in the holdings of this Court. There is no novelty to the idea that a system should and will become unitary. It is fervently to be hoped that school desegregation cases, like all other litigation, will eventually come to an end. This Court has often and consistently said that the goal in school desegregation cases is a unitary school system. Green v. School Board of New Kent County, 391 U.S. 430, 436 (1968); Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964); Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II). "Our objective in dealing

with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." Swann, 402 U.S. at 23. This Court has always said that the job of the federal courts ended when the system became unitary. Green, supra; Swann, supra.

Neither is there novelty in the idea that busing, zoning and pairing, remedial tools to be used in the interim transition period between the unconstitutional dual system and the constitutional unitary system may be laid aside when the unitary system is attained. Swann, supra. The Swann Court itself said nothing less. It called these measures remedies, it expressed the hope that court intervention would cease upon

achievement of a unitary system, and it reminded us that school desegregation remedies cannot be made to carry too much baggage and cannot be used to cure all society's ills. Swann plainly contemplates exactly the result reached below.

The distinction between liability and remedy stages of lawsuits is very common in the law. Yet petitioners insist that the courts below erred in refusing to apply remedy standards to proof of liability issues. The trial court applied the proper constitutional tests, as will be discussed in Part III, below, and found the petitioners' proofs wanting.

Petitioners contend that the Court of Appeals has written a charter for the resegregation of schools in the South.

This is plainly untrue, but before showing why, the School Board must state its exception to the terminology used by petitioners here and throughout.

Petitioners since the beginning of this case have referred to "segregated" schools and "resegregation" and have sought to load those terms with every bit of evil connotation that they possibly could carry. Also, they have sought to obscure the distinction between de jure and de facto segregation. Quoting from cases reciting the evils of de jure segregation, they apparently contend that the School Board must eradicate de facto residential segregation in Norfolk.

Racial imbalance, without explanation, has no constitutional significance. This Court has uniformly

condemned de jure segregation, whether imposed by state law, Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I), or by state or local government authorities without sanction of law, Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Columbus Board of Education v. Penick, 443 U.S. 449 (1979). This Court, like the School Board, regrets the existence of de facto segregation not caused by school authorities, but it has never held it unconstitutional or forced its eradication by school authorities. Keyes v. School District No. 1, 413 U.S. 189 (1973). The "basic constitutional requirement [is] that the State not discriminate between public school children on the basis of their race." Swann, 402 U.S. at 13. "[T]he differentiating

factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate." Keyes, 413 U.S. at 208.

This Court has condemned "dual" school systems and has said they must be dismantled and supplanted by "unitary" systems. Dual systems are those in which, with intent to discriminate on the basis of race, the school authorities operate one set of schools for whites and another for blacks. Brown I, supra. Unitary systems are those in which, without racial discrimination, there are operated not white schools, not black schools, but "just schools". Green, 391 U.S. at 442.

Focusing on "segregation" as a term which looks to racial proportions--

numbers alone--obscures the constitutional inquiry, which is whether racial discrimination plays a part in the operation of the school system.

The Court of Appeals' decision does not provide a charter for "resegregation of schools in the South." Systems which have not become unitary will have no benefit from the Court of Appeals' decision, and systems which have become unitary will be subject to the same scrutiny employed below--the courts will prevent their acting with intent to discriminate. A system which satisfies the court that it has eliminated discrimination and remained unitary for a substantial period of time should, without discriminatory intent, be entitled to shed remedies which are no longer needed. This is not "resegregation."

This Court's cases do not teach that unitariness is a physical construct of court-ordered remedies that must fall if one of the remedies is removed. A unitary system is a system of schools, administered without discrimination, that are just schools with none set aside for children of one race or another and with no child either compelled or forbidden on account of his race to attend a particular school. When this is achieved, as in Norfolk, no child has less than a full opportunity to receive the education to which he is entitled without being stigmatized by a label of inferiority. Busing is not needed to preserve the unitary system. Racial balance has not been the goal of this Court's school desegregation decisions. The objective has been schools from

which no child is excluded on the basis of race. Swann, supra. That objective has long since been accomplished in Norfolk.

Petitioners also say that this case will allow school systems which become unitary "immediately" to abandon desegregation and contend that Norfolk did so "promptly" after being declared unitary. This is simply not so. Nine years had elapsed between the unitary order and the trial. The District Court noted that the busing and pairing plan in effect in 1975 "had been unaltered in any appreciable respect since July, 1971, and . . . has remained essentially unaltered into 1984." 627 F.Supp. at 819. As petitioners note, busing continued pending appeal through the 1985-1986 school year. At the time the Board

adopted the Proposed Plan, busing had been in effect for twelve years, and the system had been declared unitary eight years before. Nearly two full generations of elementary school students had passed through the system in those years. No child presently in the Norfolk school system has ever attended segregated schools in Norfolk. The Board's action was neither "immediate" nor "prompt". The Court of Appeals' decision does not authorize or encourage "immediate" action of any kind.

Respondents have not, in any event, "abandoned" desegregation. They have curtailed busing, and that only for elementary school students (grades K-6 at trial, now grades K-5). Busing and racial balancing continues for middle schools and high schools. Multicultural

programs and annual accountability to the United States Magistrate ensure that students in the ten predominantly black schools will not be deprived of equal educational opportunity. And, as the District Court and Court of Appeals noted, the neighborhood school attendance zones are drawn in order to maximize integration. The petitioners contend that all this is sham and pretext, contrary to factual findings of the District Court. Petitioners even refuse to give the School Board credit for the way in which it has drawn the attendance zones, criticizing the Board because the zones do not follow the lines of historical or cultural neighborhoods.

Petitioners say that the decision below will result in a flood of litigation. First, they say that school

authorities everywhere will attempt to "emulate" Norfolk and that they will be sued for it. The decision below makes clear that the fact by itself that some schools in the unitary system will enroll mostly black students will not result in loss of unitary status. Petitioners made no serious effort below to prove any actual discrimination. Their case rests on enrollment statistics, and the Court of Appeals, following the precedents in this Court, has said that is not enough viewed in light of Norfolk's continued operation of a unitary system and the School Board's dedication to maintaining a stably desegregated system and its ability to do so. Thus, lawsuits against other unitary school systems should arise only where there is evidence of discrimination.

Second, petitioners say that the holdings below will cause lawyers who represent plaintiffs "to resist the closure of all school cases, and any acknowledgement that a district is 'unitary', as long as possible". Petition, page 39. Of course, lawyers are obliged to contest a finding of unitariness if they have reason to doubt its accuracy, and the district courts are charged with retaining jurisdiction until they are sure the systems are unitary. Green, supra. But to resist where discrimination has been eliminated would be grossly irresponsible. That some may do so cannot justify invasion of the rights of the school authorities, in whose hands, absent discrimination, this Court has said administration of the schools should be.

Petitioners say that Norfolk has returned to the conditions condemned in Monroe v. Board of Commissioners, 391 U.S. 450 (1968). This is not 1968, and much has passed since then, including a finding in Norfolk that the school system is unitary and that discrimination had been eliminated from it. That was over ten years ago, when none of the present respondents sat on the School Board. Three of the respondents here charged with racial discrimination are black. The superintendent and two of three regional assistant superintendents are black. Faculties are integrated. To accept petitioners' argument is to say that busing must go on virtually forever. This Court has never said that. The result reached below was clearly foretold in Swann. There is no

reason for this Court to disturb the Court of Appeals' decision or the District Court's findings of fact.

Petitioners have failed to demonstrate how this case comes within this Court's Rule 17.

II. BY BECOMING UNITARY, THE NORFOLK SCHOOL SYSTEM DISCHARGED THE DUTY TO ELIMINATE THE PREVIOUS DUAL SYSTEM, AND ITS ADOPTION OF THE NEIGHBORHOOD ELEMENTARY SCHOOLS PLAN AS APPROVED BY THE COURTS BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS.

Petitioners contend that the decisions below are inconsistent with this Court's holding in Swann. Swann dealt with what remedies could be imposed by the courts to hasten the eradication of dual school systems. On practically every page of this Court's opinion in Swann appears the word "remedy", and the

Court made clear that these remedies were to be imposed during the interim transitional period during which the dual system was converted to a unitary system. Any reference to Swann which implies that it sets standards of proof of discrimination overlooks the fundamental remedial nature of Swann. The decisions below conflict not at all with Swann.

Dual school systems must be dismantled by affirmative steps and replaced with unitary systems. Brown I, supra; Green, supra. School authorities who cannot show that they have disestablished their dual system are subject to court-mandated disestablishment. Columbus, supra. "In seeking to define . . . how far this remedial power extends it is important to remember that

judicial powers may be exercised only on the basis of a constitutional violation." Swann, 402 U.S. at 16. The Norfolk dual system was disestablished, the system became unitary, and the District Court found it so. Having satisfied its duty to dismantle the dual system, the School Board is no longer liable to claims that it has failed to do so and is no longer obliged to take artificial action to preserve racial balance in the schools. "Dismantling" the dual school system was contemplated by this Court to be a "process" which is at some time "completed." Wright v. Council of City of Emporia, 407 U.S. 451, 452, 470 (1972). "And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon

school boards or States to maintain integration." Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 492 (1982) (Powell, J., dissenting).

A neighborhood school system which results in racial imbalance is not unconstitutional unless it results from intentional discrimination. Crawford v. Los Angeles Board of Education, 458 U.S. 527, 537 n.15 (1982); Columbus, supra; Keyes, supra.

The District Court found, as a fact, (as was found by the Beckett court in 1969, see 784 F.2d at 543 and n.20, Appendix at 94A) that the School Board was not responsible for residential patterns, and this finding was affirmed by the Court of Appeals. The public housing projects, which petitioners wrongly label "ghettos", are open to all

eligible tenants regardless of race. No one is forced to live in them because of his race. The evidence at trial, even that of petitioners' experts, showed that Norfolk is basically a residentially well-integrated city, as is reflected in the Board's ability to draw attendance zones for 25 substantially integrated elementary schools. Official barriers to blacks wishing to live in formerly all white neighborhoods have fallen. But busing did not cause these barriers to fall, and busing will not eliminate the remaining predominantly black residential areas.

Petitioners argue that Swann places the burden on the School Board to show that it has not discriminated in adopting a neighborhood schools plan. Swann holds that, where a dual system

exists, the burden is on the school authorities to show why one-race schools remain in a remedial plan. The instant case does not involve a remedial plan but involves the question whether the School Board has discriminated. Swann does not shift the burden of proving liability and is, therefore, inapposite on that issue.

The inapplicability of Swann to unitary systems is clear from its own language. "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. . . . The remedy for such [deliberate] segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be

avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." 402 U.S. at 28 [emphasis added].

Petitioners contend that Columbus, supra, and Dayton II, supra, impose a continuing duty on respondents to disestablish the dual school system. Neither case imposes any obligation after the dual system is disestablished, and neither involved a system which had become unitary. "The Board has never seriously contended that it fulfilled its affirmative duty or the heavy burden of explaining its failure to do so." Dayton II, 443 U.S. at 538-39. "The Board's continuing 'affirmative duty to disestablish the dual school system' is therefore beyond question, . . . and it has pointed to nothing in the record

persuading us that at the time of trial the dual school system and its effects had been disestablished." Columbus, 443 U.S. at 460-61 [citation omitted].

"[T]he measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." Dayton II, 443 U.S. at 539 [emphasis added]. When the system becomes unitary, its future actions should be judged by their purpose, not by their impact.

"[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." Washington v. Seattle

School Dist. No. 1, 458 U.S. 457, 474 (1982).

Petitioners say that the School Board seeks the "legal right to reestablish the exact situation that the injunction was designed to bring to an end." Petition, page 47. This is untrue. The injunctive relief in the Beckett case was designed to dismantle the dual system, not permanently to sustain artificial racial balance in the schools.

Petitioners argue that the neighborhood school plan is an effort to "re-establish" the dual system in violation of Swann, Dayton II and Columbus. Those cases suggest that the district court use care to prevent such re-establishment in the course of the court's supervision of the dismantling

of the dual system. This case is not at such a remedial stage. However, if the Norfolk School Board did seek actually to re-establish the dual school system, such would be a constitutional violation. To ask whether the neighborhood school plan is a vehicle for the re-establishment of the dual system is simply to restate the primary issue in this case, that is, whether the neighborhood school plan was adopted for the purpose of discriminating against black children. That the Proposed Plan includes schools with predominantly black enrollments is not "re-establishment" of the dual system unless it is done with invidious discrimination. It was up to the petitioners to prove such discrimination, and they could not do so.

The schools in Norfolk under the Proposed Plan will not be "highly segregated by race," unlike the schools in Dayton II and Columbus. See Dayton II, 443 U.S. at 529; Columbus, 443 U.S. at 452. In Columbus, "70% of all students attended schools that were at least 80% black or 80% white." Id. In Dayton, 51 of 69 schools in the system were virtually all white or all black. 443 U.S. at 529. In Norfolk, all middle and high school students will attend schools enrolling substantial numbers of students of all races. In Norfolk, all white elementary students and approximately 65% of black elementary students will attend schools enrolling substantial numbers of students of all races, given the effect of Majority-Minority transfers.

Even if statistics were the sole touchstone of discrimination in schools, Norfolk is not a "dual sytem". There is no system of schools for white students. All white students will attend integrated schools. And there is no system of schools for black students. The vast majority of black students will attend integrated schools. Approximately 35% of black elementary students will attend ten predominantly black schools. No black child will be forced to attend such a school against his parents' will. No child is assigned to such a school because of his race.

Busing is a remedial measure that is not an end in itself. The 1971 Court-ordered busing plan in Norfolk resulted from this Court's decision in Swann, wherein the Court recognized that

if there were no discrimination, "it might well be desirable to assign pupils to schools nearest their homes" and that busing might be administratively awkward or inconvenient, "but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems", id. at 28 [emphasis added]; that "at some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions," Id. at 31.

The courts below correctly held that Swann's presumption against one-race schools did not apply to the unitary school system in Norfolk.

III. THE COURTS BELOW APPLIED THE PROPER STANDARDS OF PROOF OF DISCRIMINATORY INTENT.

Petitioners suggest that the impact of the Board's action, taken together with the purpose to create schools acceptable to white parents, proves discrimination. Petitioners argue that the Proposed Plan is based on "racial criteria" and is "as deliberate a segregation policy as any ever encountered." Petition, page 55. This contention rests solely on two facts: that the proposed Plan creates a number of predominantly-black schools and that the School Board considered "white flight" in making its decision.

Petitioners' contentions that the School Board does not believe integration is worthwhile and that it adopted the Plan in order to create a refuge

for white students constitute a blatant distortion of the facts and of the findings of the courts below. It was precisely because it wished to preserve integration that the Board concerned itself with white flight.

Based on Dr. Armor's 1983 and 1984 projections, the Board was justified in believing that continuation of busing would eventually lead to the schools' becoming 75% or more black systemwide. Eventually the system would become so heavily black that no meaningful degree of integration could be maintained, as has happened in other cities. Perceiving integration to be a social good, the Board acted to stem white flight. Petitioners in their own right also insist that the system should be integrated, but they suggest no way in

which that can be achieved without consideration of the races of the children. Cf. McDaniel v. Barresi, 402 U.S. 39 (1971).

The petitioners argue that the premise of the Plan was to create majority white schools which were favored by white parents. This is totally unfounded. As already noted the Armor public opinion questionnaire dealt with mandatory busing and not racial proportion. Only one question related to racial proportion, and it reflected only the fact that whites in the system and outside of it would prefer schools which were not made up primarily of blacks, had no objection to schools that were fifty percent of one race and the other, and oppose schools that were solely of one race. Indeed, an analysis of the

enrollment in 1983-84 at the time of the trial, compared with the enrollment projected in the plan, including the Majority-Minority transfers, indicates there were nine schools at the time of the trial which were over fifty percent white. Under the Plan only five additional schools become over fifty percent white, five other schools decrease in the white enrollment. The nine remaining schools, other than the ten petitioners complain of, only change by one to five percentage points. Percentages reflected in the plan are a function of demographics of the neighborhoods from which schools draw, are in no way an effort to create any majority schools, but are quite the opposite. Evidence at the trial was that the School Board drew the attendance zones

to maximize the racial balance in the schools. Nowhere in the evidence was there a suggestion that the School Board was seeking to create schools which were majority white. Rather, the evidence showed that the Board was seeking to create neighborhood schools, maximize parental involvement and hopefully and most importantly maintain the existing racial enrollments in the face of ever-dwindling white enrollment and predictions of its continuance.

Assignment to the schools in predominantly black neighborhoods is based on residence, not race. No black child is required on the basis of his race to attend such a school, and no black child is excluded on the basis of his race from attending a school that happens to be majority white in its enrollment.

"[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." Columbus, 443 U.S. at 464.

To argue that a neighborhood attendance plan which includes schools predominantly black in their enrollment thereby creates a racial classification is nothing more than an argument that a one-race school is proof per se of invidious discrimination. If this were the law, de facto segregation would always require a court-ordered desegregation remedy. It does not. Crawford; Columbus; Keyes. Petitioners' contention that the predominantly black schools are, of themselves, a racial classification is an effort to circumvent these holdings.

Neither is there merit in petitioners' suggestion that consideration of white flight in adopting the Proposed Plan creates a racial classification. Admittedly, a dual system cannot consider white flight as an excuse not to formulate a desegregation remedy, but absent a constitutional violation the effects of white flight may be considered in formulating a voluntary plan. Crawford, infra. The Board's hope that the Plan will stabilize white enrollment in Norfolk's unitary system is not a racial classification.

In Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982), California amended its constitution to prohibit its courts from ordering busing in cases where the Fourteenth Amendment did not require it, abolishing

court-ordered busing as a state law remedy for de facto school segregation. Analyzing whether the amendment was adopted for discriminatory purposes, this Court included among possible non-discriminatory motives that the "voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem," id. at 543, referring to statistics showing the change in racial composition of the Los Angeles school enrollment, including a drop from 53.6% white in 1968 to 23.7% white in 1980. Id. at 530 n.1.

The Crawford Court explicitly rejected the contention that the amendment created a racial classification, stating "[i]t neither says nor implies

that persons are to be treated differently on account of their race. . . . The benefit it seeks to confer--neighborhood schools--is made available regardless of race." Id. at 537.

The duty of the courts "in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to and did in fact discriminate against minority pupils, teachers, or staff." Dayton Board of Education v. Brinkman, 433 U.S. 406, 520 (1977) (Dayton I).

The trial court properly applied the tests for proof of discrimination set out in Arlington Heights v. Metro.

Housing Corp., 429 U.S. 252 (1977) and Washington v. Davis, 426 U.S. 229 (1976). Petitioners relied below on the description of relevant evidence set forth in Arlington Heights, 429 U.S. at 666-68, these being impact, historical background, sequence of events leading to the decision, and "legislative" history. The District Court found, reviewing that evidence, that discrimination was not proved. The Court of Appeals reviewed and affirmed the District Court's findings, holding that the evidence supported them. This Court should do no more. Petitioners have failed to show why this case should be reviewed here.

CONCLUSION

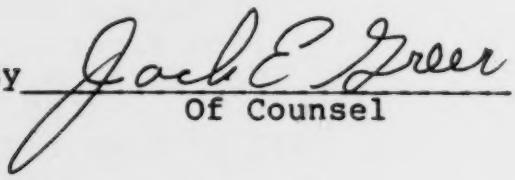
The Norfolk public schools have been unitary for over eleven years. The

School Board has not abandoned desegregation but has simply curtailed crosstown busing of elementary students, partly in the hope that such action will preserve long-term integration of the system. This result follows clearly from Swann, it does not eviscerate Swann, and it does not authorize "resegregation" of schools anywhere. The District Court having applied the proper standards and found no discriminatory intent as a matter of fact, the Court of Appeals acted correctly in affirming its decision. For the reasons set forth herein, the School Board of the City of

Norfolk prays that the Court will deny the petition for certiorari.

Respectfully submitted,

THE SCHOOL BOARD OF THE
CITY OF NORFOLK, et al.

By 
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CERTIFICATE

I certify that on this 27th day of June, 1986, three copies of the foregoing were mailed, postage prepaid, to:

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All parties required to be served have been served.

Jack E. Greer